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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-589

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

versus

LLOYD DUGAS, PELICAN CONSTRUCTION COMPANY, INC., and TRI-STATE INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ADAMS and REESE,
HENRY B. ALSOBROOK, JR.
GEORGE V. BAUS
HAROLD A. THOMAS
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Counsel for Union Oil Company of California.

SUBJECT INDEX

	Page
Table of Authorities	i
Jurisdictional Statement	1
Questions Presented for Review	2
Statement of the Case	2
Reasons for Granting Writ of Certiorari	4
Argument	4
Conclusion	7
Certificate	8
Appendix A	11
Appendix B	28
Appendix C	29

TABLE OF AUTHORITIES

Cases — **Page**

Chesapeake & O.R.Co. v. Mihas, 280 U.S. 102, 74 L. Ed. 207---------- 5

Demarest v. T.C. Bateson Construction Co., 370 F. 2d 281 (5th Cir. 1966)---- 6

Italia Societa v. Oregon Stevedoring Company, 376 U.S. 315, 84 S.Ct. 748, 11 L. Ed. 2d 732 (1964)---------- 4,6,7

Leisner v. Atlantic Coastline Railroad Co., 420 F.2d 682 (5th Cir.1969)- 6

Parsons v. Amerada Hess Corporation, 422 F.2d 610 (5th Cir. 1970)---------- 6

Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation, 350 U.S. 124, 76 S.Ct.232, 100 L.Ed. 133------- 7

Sword v. Gulf Oil Corporation, 251 F.2d 829 (5th Cir. 1958)---------- 6

Ward v. Hobart Manufacturing Co., 450 F.2d 1176 (5th Cir. 1971)---------- 6

Wisenant v. Brewster-Bartle Offshore Company, 446 F.2d 394 (5th Cir.1971)-- 7

Statutes

46 U.S.C. 688---------- 4

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JURISDICTIONAL STATEMENT

The Court of Appeals for the Fifth Circuit entered its opinion on June 11, 1973, and a judgment was thereafter rendered on July 13, 1973, in accordance with Rule 36 of the Federal Rules of Appellate Procedure. On July 5, 1973, United States Court of Appeals for the Fifth Circuit entered an order on the Petition for Rehearing denying same.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether liability can attach to a contractee in absence of a duty owed under the General Maritime Law, and whether an appellate court, after vitiating the basis upon which the trial court found liability, may enter a judgment without remand for additional fact finding by the trial court.

STATEMENT OF THE CASE

The present action is a Jones Act claim against Pelican Construction Company (Pelican), Rowan Drilling Company (Rowan) and Union Oil Company of California (Union). The plaintiff also seeks relief under the General Maritime Law.

The plaintiff, Lloyd Dugas, was employed by Pelican as a roustabout, or jack-of-all-trades. Pelican was in the business of providing roustabout labor in oilfield operations.

Union had contracted with Rowan to drill a well to 13,000 feet. Rowan provided a submersible drilling barge, the drilling rig, and personnel to operate the drilling rig. After the contract depth was reached, Union determined to drill a deeper hole, and it then was Union's obligation, rather than Rowan's, to furnish the drill pipe.

On the particular drilling barge in question, the Rowan No. 1, Union at all times kept one man aboard the rig to see that the terms of the drilling contract were fulfilled.

On the day before the accident, Union had contacted Pelican to furnish it with a labor crew and supervisors (pushers) to unload drill pipe from a barge which it had delivered to

the drilling site. Pelican sent out a crew with supervisors as requested.

While engaged in unloading a pipe barge and supplying the Rowan drilling crew with drill pipe as needed, the plaintiff, a member of the Pelican crew, was injured. The injury occurred when Pelican's pusher, Mr. George, lifted a load of pipe with an air hoist, which load twisted striking plaintiff. The load was then allowed to come to rest on the plaintiff's leg.

At the end of the trial, the trial judge stated that he felt that the evidence in the case showed that Mr. Dugas' injuries were caused by the negligence of Mr. George, the hoist operator, and partly by the plaintiff's own contributory negligence. Two years later, the court, in its reasons for judgment, held that the accident was caused solely by the fatigue of the Pelican crew, and that the plaintiff was a borrowed servant of Union and a Jones Act seaman. The court further stated that Union was negligent in failing to provide an adequate crew for the Rowan No. 1 drilling barge, even though Union had not undertaken to provide a crew to man the drilling barge, Union's only representative was asleep, having no knowledge that the Pelican crew may have been fatigued and had contracted with independent contractors to get the work at hand done.

On review, the Fifth Circuit Court of Appeals, held that as a matter of law, the plaintiff was not a Jones Act seaman, nor was a borrowed employee of Union's. The court further held that he was a Sieracki seaman and entitled to the warranty of seaworthiness. The court further held Union liable on the trial court's finding that Union was negligent, and because of Union's negligence, it

held that the Rowan No. 1 drilling barge was unseaworthy.

REASONS FOR GRANTING CERTIORARI

The opinion for the Court of Appeals for the Fifth Circuit established liability on the part of Union Oil Company of California after severing all legal relationships between the plaintiff and Union as found by the lower court.

The Court of Appeals for the Fifth Circuit failed to remand the case for additional findings regarding the conduct of the stevedoring company in light of its reversal of the lower court's determination of legal relations, contrary to this Court's ruling in Italia Societa v. Oregon Stevedoring Co., 376 U.S. 318, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964).

ARGUMENT

I

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS ESTABLISHING LIABILITY ON THE PART OF UNION OIL COMPANY OF CALIFORNIA IS WITHOUT BASIS UNDER THE GENERAL MARITIME LAW OR ANY OTHER LAW.

The Fifth Circuit's opinion, in the present case, has created liability without a breach of a legal duty. It is obvious that the district court relied on the Jones Act, 46 U.S.C. 688, for the existence of a duty owed by Union to Dugas. However, the Fifth Circuit reversed the finding of the lower court on the status of Dugas as a seaman and a "borrowed employee" of Union. It is submitted to this Court that no independent duty other than that not to physically harm plaintiff was owed to Dugas by Union.

This Court has previously held that:

> "[t]he rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was owing to the complainant."
>
> Chesapeake & O.R. Co. v. Mihas, 280 U.S. 102, 74 L. Ed. 207.

In order for such a duty to be owed to Dugas by Union, there must exist a relationship between the two which would establish a duty. Regarding a relationship between Union and Dugas, the Fifth Circuit stated:

> "In this case there is not even minimal suggestion, criticism, recommendation or advice in any form by Ditch (Union representative) to Dugas regarding any details of the operation. Dugas has no contact whatsoever with Ditch. He took orders from his pusher only."

and,

> "There is nothing in the record to indicate that Pelican or Union either intended or desired to establish a borrowed employee relationship between Union and the man Pelican supplied."

Yet, the Fifth Circuit held that the negligence of Ditch, who had retired for the evening, was the sole cause of an accident which occurred during a drilling operation.

It is hornbook law that a defendant cannot be held negligent if he does not owe a duty to the aggrieved party. Leisner v. Atlantic Coastline Railroad Co., 420 F. 2d 682 (5th Cir. 1969); Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971).

An owner or contractee has no direct duty to employees of an independent contractor in the absence of actual control of operations by the owner or its employees. Sword v. Gulf Oil Corporation, 251 F. 2d 829 (5th Cir. 1958); Parsons v. Amerada Hess Corp., 422 F.2d 610 (5th Cir. 1970); and, Demarest v. T. C. Bateson Construction Co., 370 F.2d 281 (5th Cir. 1966).

It is clear that the Fifth Circuit erred in accepting the factual findings of the lower court which were predicated on its legal theories of status and employment, while reversing the basis of such findings.

II

THE FIFTH CIRCUIT COURT OF APPEALS WRONGFULLY DECIDED THE PRESENT ACTION WITHOUT A REMAND FOR FURTHER FINDINGS BY THE LOWER COURT CONTRARY TO THIS COURT'S DECISION IN ITALIA V. OREGON STEVEDORING CO., 376 U.S. 315, 84 S. CT. 74, 11 L. ED. 2D 732 (1964).

In light of its holding that Dugas, and for that matter all members of the Pelican crew, were not borrowed employees of Union, the Fifth Circuit's failure to remand the case for additional findings of fact was improper.

Because the lower court held in essence that all employees aboard the rig were "borrowed servants" of Union, it held that Union, as the Jones Act employer, had failed to

exercise due care for its employees.

By holding that Rowan, Union and Pelican were in fact independent contractors, the Fifth Circuit should have remanded the case to the lower court for a determination of whose duty it was and who breached the duty of failing to exercise reasonable care for the plaintiff's safety, instead of accepting the determination of the lower court that Union (including employees of Rowan and Pelican) was guilty of negligence.

Certainly, if the ultimate determination of supplying a relief crew or ordering rest breaks was vested in the Pelican pushers, the warranty of workmanlike performance was breached and complete indemnity would be owed to Union Oil Company of California and Rowan Drilling Company by Pelican Construction Company. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964); Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); and, Wisenant v. Brewster-Bartle Offshore Co., 446 F. 2d 394 (5th Cir. 1971).

CONCLUSION

It is apparent that Union Oil Company of California was held liable to the plaintiff without having breached a legal duty owed to him. It is further submitted that the Fifth Circuit Court of Appeals erred in failing to remand the case to the lower court for additional factual findings in accordance with its opinion. For the reasons and arguments

set forth above, a Writ of Certiorari should issue herein.

Respectfully submitted,

ADAMS AND REESE

BY: _____
HENRY B. ALSOBROOK, JR.
GEORGE V. BAUS
HAROLD A. THOMAS
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Counsel for Union Oil Company of California

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon Mr. H. Alva Brumfield, III, 509 St. Louis Street, Baton Rouge, Louisiana; Mr. A. R. Christovich, Jr., 1815 American Bank Building, New Orleans, Louisiana; Mr. Clarence Frost, 1207 Whitney Building, New Orleans, Louisiana; Mr. Nicholas Pugh, Post Office Box 3118, Lafayette, Louisiana; and Mr. Donald Organ, 1740 National Bank of Commerce Building, New Orleans, Louisiana, by depositing same in the United States Mails, postage prepaid, this 2nd day of October, 1973.

_____
HENRY B. ALSOBROOK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

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Petitioner

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HENRY B. ALSOBROOK, JR.
GEORGE V. BAUS
HAROLD A. THOMAS
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Counsel for Union Oil Company of California

TABLE OF CONTENTS

	Page
APPENDIX A Opinion of the U. S. Court of Appeals, Fifth Circuit issued June 11, 1973 ----------	11
APPENDIX B Order Denying Petition for Rehearing ----------	28
APPENDIX C Order of the U.S. District Court, Western District of Louisiana, dated March 22, 1972 ----------	29

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2546

LLOYD DUGAS,
Plaintiff-Appellee,

versus

PELICAN CONSTRUCTION COMPANY, INC., ET AL.,
Defendants-Appellees,
ROWAN DRILLING COMPANY and
UNION OIL COMPANY OF CALIFORNIA,
Defendants-Appellants,
TRI-STATE INSURANCE COMPANY, ET AL.,
Third-Party Defendants.

Appeals from the United States District Court for the Western District of Louisiana

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(June 11, 1973)

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: Lloyd Dugas, a roustabout employed by Pelican Construction Company, Inc., brought this suit for damages growing out of per-

sonal injury sustained aboard a submersible drilling barge, ROWAN NO. 1, owned by Rowan Drilling Company and located on navigable waters at Northeast Patterson Prospect Field, south of Morgan City, St. Martin Parish, Louisiana.

Union Oil Company of California had contracted with Rowan for the drilling of an oil and gas well at that location. The contract provided that Rowan furnish a drilling rig and barge and the necessary personnel to operate them. Union was required under the contract to furnish a tugboat and service barge to be used in connection with the operation. Contract depth was specified to be 13,500 feet, for which Rowan was to be paid a fixed rate per linear foot. Rowan was to provide the drilling pipe up to the contract depth. Beyond 13,500 feet the operations were to be conducted on a day-work basis agreement under which Union would furnish the drilling pipe to Rowan.

In addition to the contract with Rowan, Union had a service contract with Pelican for the furnishing of labor crews as requested by Union.

On September 8, 1964, Rowan was in the process of drilling the well for Union and was operating on day rate, having exceeded the contract depth. Kenneth Ditch, the foreman for Union and its only representative on the drilling barge, called Pelican's office and requested that a crew of roustabouts be sent out to work aboard the drilling barge. Accordingly, a Pelican crew of two pushers, Edward George and Oris Cormier, and four roustabouts, including plaintiff Du-

gas, left Morgan City, Louisiana, by crewboat and proceeded to the drilling barge, where they arrived at approximately 10 a.m. George was informed by Ditch that the Pelican crew was to unload drilling pipe from a pipe barge onto the drilling barge. The pipe barge, owned by Union and loaded with 4 1/2-inch drill pipe provided by Union, was lying alongside the drilling barge, unmanned. The drilling barge was equipped with a crane and air hoist for use in moving pipe from the pipe barge to the pipe rack aboard the ROWAN NO. 1, and thence to the V-door at the drilling floor when needed by Rowan to run the pipe into the well hole.

Upon arrival at the drilling site, the Pelican crew were assigned various jobs preparatory to unloading the pipe. Sometime in the afternoon the unloading operation began, with George, an experienced air hoist operator, operating the hoist and crane. At 7 p.m. Rowan began putting the pipe into the hole.

The accident which precipitated this suit occurred at about 4:30 a.m., the following day. Dugas was then working at the far end of the pipe rack on the drilling barge. He and a Pelican co-worker had just attached a sling to a load of six joints of pipe. George then lifted the pipe but the load instead of moving to the V-door, swung back and hit Dugas, who had turned and was walking in the opposite direction, knocking him to the floor of the rig. When observing Dugas fall, George placed the hoist in neutral, left the controls, and ran to a point on the upper deck where he could

see Dugas, at which time the air hoist "bled off" allowing the load of pipe to settle on Dugas' legs.

Dugas claimed damages from Pelican,[1] his employer, Union and Rowan, asserting liability under the Jones Act, the general maritime law and maritime tort. His theory for Jones Act liability against Union and Rowan was based on the theory that he was the borrowed servant of these defendants.

Thereafter a progression of cross-claims between defendants followed, with the parties asserting every known theory of maritime indemnity — tort, contractual (express and implied) and third-party beneficiaries to rights of others under contracts. Virtually everyone claimed over against virtually everyone else.[2] As a result of these numerous claims and long, protracted pretrial procedures, including the taking of depositions, interrogatories and the utilization of other discovery devices, the case did not proceed to trial until almost five years after the initial complaint was filed and approximately six years following the accident, a period much longer than the memory span of most of the testifying witnesses. Consequently, the evidence was in many instances sketchy or conflicting. Nevertheless, the district judge, sitting without a jury, found that the sole proximate cause of the injury was the negligence of Union in allowing the Pelican crew to

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[1]Pelican's insurance carrier, Tri-State Insurance Company, was also named as a defendant.

[2]Rowan filed no cross-claim against Union. We understand from counsel at oral argument, however, that Rowan has instituted separate proceedings against Union seeking indemnity.

become fatigued and overworked on an undermanned vessel which thus became unseaworthy. In this regard the district judge made the following pertinent findings:

> "All of the Pelican crew testified that they were very tired. Cormier requested relief at ten o'clock p.m. and again at about two o'clock a.m. Mr. Ditch, the Union superintendent, and the man in charge, had retired for the night. None of the Rowan men had authority to order a relief crew to come out. Mr. Bevills, Rowan's toolpusher, stated that no one requested relief of him that he can remember; but if they had, he would have taken the matter up with Mr. Ditch. Under these circumstances, Union's failure to exercise reasonable care for the safety of the men furnished to it by Pelican was negligence, and its failure to provide a sufficient number of men to do the work that had to be done resulted in an unseaworthy, undermanned ship, which rendered the vessel itself not reasonably fit for her intended use and dangerous to the well being of those aboard her . . . We find that the inattention of George in allowing the load to swing toward Dugas, as well as the fact that Dugas has turned his back to the load and failed to watch it, as he should have, were the result of their fatigue, a condition that could and should have been foreseen by Union. No effort was made to allow these men to even have a few minutes rest after they began running pipe, or to provide them with

> food although there was food available. They came aboard, went about their appointed tasks as directed by Mr. Ditch and were therafter completely neglected. We hold that this failure on the part of Union and the resulting unseaworthiness of the ship was the sole proximate cause of the accident."

The district court further found that the dereliction of George and Dugas, if any, was caused by fatigue due to the unrelieved long hours and sustained heavy labor, and did not under the circumstances constitute negligence on their part which was a contributing cause of the accident. The district court concluded that Dugas was a Jones Act seaman of Union under the borrowed servant theory. Damages were assessed in the sum of $45,000 against Union and Rowan as joint tort-feasors — Union, because of its negligence, and Rowan, because of the unseaworthiness of the ROWAN No. 1 caused by Union's negligence. Judgment was also rendered in favor of Union on its cross-claim against Rowan for contribution in the sum of $22,500. Judgment was then rendered in favor of Union on its cross-claim against Pelican and Tri-State for one half the amount of the award, under the terms of the contract between the parties, which the district court construed as requiring indemnification for injuries to Pelican's employees regardless of causal negligence by Union. All of the other cross-claims and a counterclaim by Pelican against Market Insurance Company, its public liability insurance carrier, were denied. In short, Rowan and Pelican were each liable for one

half the amount of judgment, or $22,500 each, under the district court's decree.

Rowan and Union have appealed; Pelican has not appealed inasmuch as it has filed a motion for new trial which inexplicably is still pending in the lower court. Consequently, the issues of contractual indemnity between Union and Pelican and the dismissal of Market Insurance Company are not before us.

ISSUES ON APPEAL COMMON TO ROWAN AND UNION

Both Rowan and Union contend that the district court erred in finding that Dugas was a Jones Act seaman and a borrowed employee of Union; that fatigue contributed to the accident; and in that there was no causal relationship between the accident and the joint and concurrent negligence of plaintiff in turning his back on the pipe, and George in negligently operating the air hoist.

ADDITIONAL ISSUES URGED BY ROWAN

Rowan further contends that the district court erred in basing a finding of unseaworthiness on the undermanning of Pelican's crew, and in failing to award Rowan full indemnity against Pelican because of the latter's alleged breach of the implied warranty of workmanlike service owed to Rowan under the "Ryan"[3] theory of indemnity, as extended by

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[3]Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp., 350 U. S. 124, 76 S. Ct. 232 (1956).

Whisenant v. Brewster-Bartle Offshore Company, 5 Cir., 1971, 446 F.2d 394.

ADDITIONAL ISSUES URGED BY UNION

Union further contends that the district court erred in failing to grant it full contractual and tort indemnity from both Rowan and Pelican under its contracts with the respective parties and under the active-passive theory of tort indemnity enunciated in *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drill. Co.*, 5 Cir., 1969, 410 F.2d 178.[4]

The evidence does not support the district court's findings that Dugas was a Jones Act seaman or a borrowed employee of Union. To qualify for Jones Act benefits, an injured worker must be on more or less permanent assignment to a vessel or performing a substantial part of his work aboard a vessel. *Offshore Company v. Robison*, 5 Cir., 1959, 266 F.2d 769, 779;[5] *Thibodeaux v. J. Ray McDermott & Co.*, 5 Cir., 1960, 276 F.2d 42; *Rotolo v. Halliburton Company*, 5 Cir.,

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[4]Union seeks full indemnity against Pelican as a protective measure in the event that Rowan should fail to satisfy Union's judgment for contribution.

[5]According to Robison, there is an evidentiary basis for a Jones Act case "(1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." 266 F.2d at 779.

1963, 317 F.2d 9. Dugas had been employed by Pelican approximately one week prior to his going aboard the ROWAN NO. 1 for the first and only time. Pelican was not the vessel owner and the duties which it assigned to Dugas during that week — cutting grass, repairing a bridge, and land-based office work — were not duties performed aboard a vessel. He and the other Pelican roustabouts were sent out to the ROWAN NO. 1 to do one job — unload a certain number of pipe joints. When the assignment was completed their tour of duty aboard the barge terminated. The job was expected to last, and did last, only a day. Plaintiff's brief tenure aboard the vessel fell far short of establishing seaman status. However, Dugas was entitled, by virtue of the maritime character of the work he performed, to the warranty of a seaworthy vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1946). Rowan and Union concede as much, denying, however, that that warranty was breached.

Nor do we think Dugas was a borrowed employee of Union. In *Ruiz v. Shell Oil Company*, 5 Cir., 1969, 413 F.2d 310, we listed various factors to be considered in determining whether or not a borrowed employee relationship exists. *Id.* at 313. Although the trial judge employed the correct legal standards, citing *Ruiz* as authority for his holding, he erroneously concluded that Dugas was a borrowed employee of Union. In *Ruiz* we held that the borrowed employee status did not exist because the factor of control, *inter alia*, had not been relinquished by the general employer nor accepted by the temporary employer. The facts in the present case lead us to the same conclusion. We recognized

in *Ruiz* a distinction between authoritative direction and control over the servant, and mere suggestion as to details or cooperation by the servant with the temporary employer where the work being furnished was part of a larger undertaking.[6] In this case there is not even minimal suggestion, criticism, recommendation or advice in any form by Ditch to Dugas regarding any details of the operation. Dugas had no contact whatsoever with Ditch. He took orders from his pushers only. While numerous factors must be considered to determine whether an individual is a borrowed servant or employee of another, essential to that relationship is some type of agreement, written or verbal, formal or informal, between the general employer and the temporary employer evidencing an intention to create that relationship. There is nothing in the record to indicate that Pelican or Union either intended or desired to establish a borrowed employee relationship between Union and the men Pelican supplied. The written contract itself negates such an intention. The pertinent clause provides that

> "In the performance of the work herein contemplated, *CONTRACTOR [Pelican] is an independent Contractor*, with the authority to control and direct the performance of the details of the work, UNION being interested only in the results obtained, but the work contemplated herein shall meet the approval of UNION. *CONTRACTOR specifically agrees that*

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[6] *See* Standard Oil Co. v. Anderson, 212 U.S. 215, 222, 29 S.Ct. 252, 254 (1909); Ruiz v. Shell Oil Company, 5 Cir., 1969, 413 F.2d 310 at 313.

all persons employed by CONTRACTOR in performing the work covered by this Contract, or by CONTRACTOR'S sub-contractors, *are not the employees of UNION for any purpose whatsoever. . . .*" [Emphasis supplied.]

Other traditional factors generally indicative of the borrowed employee relationship, and absent here, are "acquiescence by [the employee] that he be employed by [the temporary employer]"; a "temporary termination by the general employer of its relationship with the servant"; "the furnishing by the temporary employer of the necessary instruments and the place for performance of the work in question"; "employment of the servant over a considerable length of time"; and "the customary right to discharge the servant and the obligation for payment of his wages."[7] While no one factor or specific combination of factors is determinative of the borrowed employee relationship, the evidence here preponderates toward the conclusion that such a relationship was not present.

The trial judge held — and we agree — that the negligence of Union, with resultant unseaworthiness of the vessel, was the sole proximate cause of the accident. The trial judge found that the Pelican men were fatigued and ascribed this to the failure of Union to provide them with necessary rest periods, thus causing an undermanned and therefore unseaworthy vessel. Both Union and Rowan strongly contest these findings and urge that the negligence of George, in his operation

[7]Ruiz v. Shell Oil Company, 5 Cir., 1969, 413 F.2d 310 at 313.

of the crane and air hoist, and the contributory negligence of Dugas, in turning his back to the load of pipe, and not fatigue, were the proximate causes of the accident. Various reasons were advanced in regard to what caused the pipe to fall on Dugas. The testimony of the only two eyewitnesses, George and a Pelican roustabout, Russell Palombo, was not too helpful except to verify the fact of the accident. We are unable to say from the tenuous and conflicting evidence adduced at the trial that the district judge's finding was clearly erroneous in declining to attribute causal negligence to Pelican or to Dugas.

The evidence fully supported the finding that the men were fatigued and overworked. The Pelican crew had been working at the drilling site for approximately 18 1/2 hours without relief. By way of contrast, Rowan's men worked 12-hour shifts. Dugas and Palombo, the only other Pelican roustabout to testify, both requested relief. Dugas said that he had worked continuously. He was tired, worn out, could hardly go anymore. Palombo said he was tired as they had worked all day and all night. Cormier said they were operating under fatigue conditions, having worked continuously from the time they arrived at the drilling site at about 10 a.m. until Dugas was hurt at about 4 a.m. the following day.

The conflicting evidence in regard to whose orders were being followed in denying relief to the Pelican crew was hardly susceptible of a definite finding, but the trial judge concluded, however, under all the circumstances that Union had the responsibility to take

necessary steps to furnish relief. We agree that the evidence compels such a conclusion. Rowan had no such authority. The contract for furnishing the roustabout labor was between Union and Pelican. Rowan had no contract with Pelican. Union's superintendent, Ditch, who was the top authority in this drilling operation, was the only one in a position to relieve the crew. Ditch's testimony corroborated this fact. He said that he was authorized to call for a crew if he needed one. He had hired the Pelican men, but he had not specified the length of time they were to remain on the job. He had authority to stop operations aboard the rig if the occasion arose necessitating it. He would have been in a position to stop unloading if he had seen a situation that he felt was dangerous. The Pelican pusher had reported to him and he put him to work. According to Ditch, ordinarily it would take between 13 to 14 hours to unload the pipe in question, which was in excess of 13,500 feet. Dugas and his coworkers had been working for at least 8 1/2 hours (from 10 or 10:30 a.m. to 7 p.m.) before beginning to unload the pipe. Since Ditch estimated that the unloading would take at least 13 hours, he should have reasonably calculated that the job would not be completed until approximately 8 a.m. the next day, at which time the Pelican men would have worked a total of approximately 22 hours without relief. Ditch's failure to exercise reasonable prudence in making prior arrangements to provide for rest periods or for a substitute crew constituted serious negligence.

The concept that seaworthiness contemplates the crew as well as a vessel and its gear has been firmly

established in maritime law. In *Boudoin v. Lykes Brothers Steamship Co.*, 348 U.S. 336, 339, 75 S.Ct. 382, 385, the Supreme Court found no reason "to draw a line between the ship and the gear on the one hand and the ship's personnel on the other" in determining whether the warranty of seaworthiness had been breached. In *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 427, 79 S.Ct. 445, 447 (1959), the principle was reiterated that "[u]nseaworthiness extends not only to the vessel but to the crew." Citing *Boudoin* and *Crumady* the Supreme Court in *Waldron v. Moore-McCormack Lines, Inc.*, 368 U.S. 724, 727, 728, 87 S.Ct. 1410, 1412 (1967), said:

> "[I]t makes no difference that respondent's vessel was fully manned or that there was a sufficient complement of seamen engaged in the overall docking operation, for there were too few men assigned 'when and where' the job of uncoiling the rope was to be done."[6]

Summarizing, we agree with the district court that Union's failure to exercise reasonable care for the safety of the Pelican men was negligence and that Union's failure to provide a sufficient number of men resulted in an unseaworthy, undermanned ship. The district court also correctly cast Rowan in judgment to plaintiff as jointly and solidarily liable with Union on the main demand, in view of the finding of unseaworthiness of Rowan's vessel.

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[6] *See also* Morales v. City of Galveston, Texas, 370 U.S. 165, 82 S.Ct. 1226 (1962); Price v. SS Yaracuy, 5 Cir., 1967, 378 F.2d 156, 160 n. 9.

THE CROSS-CLAIMS FOR INDEMNITY

Union v. Rowan. Having found that Union was solely at fault, the district court correctly dismissed the claim of Union seeking indemnity from Rowan under the contract by the terms of which Rowan agreed to indemnify Union *except* for loss "caused by the sole negligence of Union." Nevertheless, the trial court considered Union's claim broad enough to support a claim for contribution under *Horton & Horton, Inc. v. T/S J. E. Dyer*, 5 Cir., 1970, 428 F.2d 1131, and rendered judgment in favor of Union and against Rowan for one half of the amount of the award. This was an erroneous conclusion. In *Horton* we allowed contribution between two joint tort-feasor vessel owners, Horton & Horton, Inc. and Vaughan Marine, Inc., both of which had been found at fault in causing the drowning of a seaman when the barge on which he was working capsized. Horton's fault was based, *inter alia*, on negligence and breach of the warranty of seaworthiness because of a leaking and otherwise defective hull. Vaughan Marine's fault was based, *inter alia*, on its negligence in failing to accept the use of pumps. Unlike the present case in which the unseaworthy condition of Rowan's vessel emanated from the negligent act of Union and without which negligence there would have been no unseaworthiness, in *Horton* each of the tort-feasors was guilty of negligence. The district court, therefore, erred in rendering judgment in favor of Union against Rowan for one half of the award.*

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*Union's argument is predicated on our treating as error the finding by the trial court of Union's causal negligence. It alleges

Union v. Pelican and Tri-State. Union's claim against Pelican under the terms of the service contract between the parties was allowed, based on the trial court's interpretation of the indemnity provision of the contract as imposing the duty upon Pelican to hold Union harmless for injury to its employees even if the injury resulted from Union's negligence. Accordingly, judgment was entered against Pelican in favor of Union for one half of the award. Pelican has not appealed from this ruling, apparently because it is not final, Pelican having filed a motion for new trial. Union contends, however, that the court erred in failing to allow it full indemnity against Pelican based on an active-passive tort theory of indemnity enunciated in *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Company*, 5 Cir., 1969, 410 F.2d 178. Implicit in this contention is that there was active negligence in Pelican through the actions of its employees George and Dugas. Since we find no clear error in the trial court's finding which absolved Pelican of negligence, the legal theory advanced by Union must fall, and indemnity against Pelican denied.

Rowan v. Pelican. Having found that Pelican was not at fault, the trial court correctly dismissed Rowan's claim against Pelican based on tort theory of

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active negligence by Rowan in failing to inform Union of the fatigued condition of the Pelican crew, and therefore that it is entitled to recover over from Rowan under an active-passive tort theory. *See* Tri-State Oil Tool Indus., Inc. v. Delta Marine Drill. Co., 5 Cir., 1969, 410 F.2d 178. Since we are unable to say that the finding of negligence was clearly erroneous, the doctrine of Tri-State inures to the benefit of Rowan, the non-negligent party, and not of Union.

indemnity. It further declined to apply the *Ryan*[10] doctrine concept of liability to Rowan's claim of a breach of the warranty of workmanlike performance (WWLP). There was no written contract between Rowan and Pelican. Rowan contends it should prevail, however, under the implied warranty doctrine of *Ryan*, as extended by *Whisenant v. Brewster-Bartle Offshore Company*, 5 Cir., 1971, 446 F.2d 394, to encompass not only stevedore employers but the specialized independent contractor employer of an injured seaman. Rowan's argument, of course, is predicated on a breach by Pelican of the WWLP. By attributing the accident *solely* to the negligence of Union, the trial court negated the possibility of any causal breach by Pelican. Even where such a breach occurs, it is immaterial unless it is a proximate cause of the accident or injuries. *Garner v. Cities Service Tankers Corporation*, 5 Cir., 1972, 457 F.2d 476, 481.

Payment to Dugas to compensate him for his injuries is long overdue. Union and Rowan, having been cast as joint tort-feasors on the main demand, must now satisfy their liability. Any further delay, contingent on the ultimate determination of liability as a result of Pelican's pending motion for a new trial on its cross-claim, would be improper.

AFFIRMED in part; REVERSED in part.

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[10]Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp., 350 U. S. 124, 76 S.Ct. 232 (1956).

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APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2546

LLOYD DUGAS,
Plaintiff-Appellee,

versus

PELICAN CONSTRUCTION COMPANY, INC., ET AL.,
Defendants-Appellees,
ROWAN DRILLING COMPANY and
UNION OIL COMPANY OF CALIFORNIA,
Defendants-Appellants,
TRI-STATE INSURANCE COMPANY, ET AL.,
Third-Party Defendants.

ON PETITION FOR REHEARING

(JULY 5, 1973)

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Union Oil Company of California in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

Filed Mar 22, 1972

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

- - - - -

CIVIL ACTION
NUMBER 11,372

LLOYD DUGAS

versus

PELICAN CONSTRUCTION COMPANY, INC., et al

- - - - - - - - - - -

FOR PLAINTIFF — Messrs. Brumfield & Brumfield, H.Alva Brumfield III, and Sylvia Roberts, 509 St. Louis Street, Baton Rouge, Louisiana 70802

FOR DEFENDANTS — Faris, Ellis Cutrone, Gilmore & Lautenschlaeger, Clarence A. Frost, Whitney Bldg., New Orleans, La.

and

Pugh & Boudreaux, Nicholls Pugh, Jr., Post Office Box 3118, Lafayette, Louisiana, 70501 FOR PELICAN CONSTRUCTION COMPANY, INC. and TRI-STATE INSURANCE COMPANY

Adams & Reese, George V. Baus, 847 National Bank of Commerce Bldg., New Orleans, Louisiana 70112, FOR UNION OIL COMPANY

Christovich & Kearney, W. K. Christovich, American Bank Bldg., New Orleans, Louisiana 70130 FOR ROWAN DRILLING COMPANY, INC.

ORGAN & PIERCE, Donald M. Pierce, 1750 Nat'l Bank of Commerce Bldg. New Orleans, Louisiana 70112, FOR MARKET INSURANCE COMPANY, Third Party Defendant

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PUTNAM, JUDGE

MEMORANDUM OPINION

Lloyd Dugas, an employee of Pelican Construction Company, Inc. (Pelican) was injured in the course of his employment on September 9, 1964, at about 4:30 a.m., while working on a submersible drilling barge owned and operated by Rowan Drilling Company (Rowan),[1] while that company was engaged in drilling a well in search of oil, gas and other minerals in navigable waters of Louisiana. Rowan was under contract for the well to Union Oil Company (Union), and at the time had exceeded the contract depth of 13,500 feet and was operating on day rate as provided in the contract.[2] Under the terms of this contract Union was required to furnish a tugboat and a service barge.[3] The parties were in the process of "running" the drill stem (drilling pipe) of some 13,500 feet of 4-1/2" pipe into the hole, preparatory to drilling to a

greater depth. Union's service barge was laying alongside Rowan's drilling barge (Rowan No. 1), loaded with 4-1/2 inch drill pipe furnished by Union for operations below contract depth on a day work basis. Ditch, the Union representative on the job, testified that while Rowan was on day rate Union furnished its own pipe to Rowan.[4]

The service barge was not manned. Mr. Ditch called Pelican to furnish a crew of men to unload the drill pipe as required by the crew of Rowan No. 1 for drilling the well. Pelican had a standing contract to "furnish labor crews and equipment as requested by Union's representative".[5] In response to this call, two roustabout pushers, Edward George and Oris Cormier, and four roustabouts, including plaintiff and Frank Palombo, were dispatched for the work.

Mr. Earl Boudreau, president of Pelican, testified that the company was engaged in the business of contracting out labor crews. It employed no specialists, just common laborers. Pelican charged Union for each man sent out. Generally, when a work crew reported for work the foreman took orders from the operator's representative and proceeded to direct his men in the performance of the work they were assigned. The largest percentage of Pelican's work was maintenance of equipment and running flow lines for oil companies, both inland and offshore. Only ten or fifteen per cent of the work was performed on or about drilling rigs.

Oris Cormier left for this job from Abbeville, Louisiana, with three roustabouts, including Dugas. They met George and another man somewhere in the vicinity of Morgan City, and went from there to the rig by crewboat. They arrived at the rig at about ten o'clock

in the morning. Cormier and George could not remember who they reported to, but from Mr. Ditch's testimony we conclude that they reported to him and were instructed to unload the drilling pipe as and when Rowan needed it on the drilling floor aboard Rowan No. 1. George did not remember any other order, but Frank Palombo, one of the roustabouts, testified that they were put to work on the barge tying on protectors for the pipe, did other jobs, then waited until Rowan's drilling crew was ready to use the drill pipe. The daily drilling report shows that Rowan began running pipe back into the hole at seven o'clock p.m. George was told to use the air hoist and crane on Rowan No. 1, but was unable to say whether this order came from Mr. Ditch or one of the Rowan employees. He did not remember who showed him how to operate the hoist, whether Mr. Ditch or a Rowan employee. In view of Mr. Ditch's testimony that he did not know how to operate a hoist, and Cormier's testimony that one of the roughnecks instructed George when they started work, we conclude that a Rowan employee gave George his instructions.

From the time they arrived at the well location until 4:00 or 4:30 a.m. the next day when the accident happened, the Pelican men were working; they had brought only one meal with them and had had no rest for approximately eighteen hours. More than ten hours of this time was spent in unloading the drill pipe.

At the time plaintiff was injured, George operated the crane, Cormier and Palombo were on the cargo or pipe barge, plaintiff and another roustabout were on the pipe rack on Rowan No. 1, and one man worked tailing pipe as it was lifted to the V-door, at the drilling floor.

Only plaintiff, Palombo and George had any idea as to how the accident in this case happened. Using the crane and hoist, pipe was removed from the Union barge alongside Rowan No. 1 to the pipe rack aboard that vessel. From the pipe rack it was raised to the V-door at the drilling floor, as needed by Rowan's crew. Rope slings separated by a singletree were used to tie on the joints. Plaintiff was at the far end of the pipe rack, about 50 feet from the hoist. He and his co-worker attached the slings to a load of six joints of pipe; when George lifted this load it swung, striking plaintiff in the legs and knocking him down. George placed the crane in neutral and ran to a point on the upper deck where he could see Dugas. The hoist was equipped with a manually operated brake, which he did not engage. When George left the controls, the air hoist "bled off" and the load settled on plaintiff's legs.

Plaintiff contends that the hoist was unseaworthy in that the controls used to swing the boom laterally did not operate properly. The evidence is in hopeless conflict on this issue. The Rowan crew testified that occasionally the cables located on the drum beneath the turntable slipped out of place and when this happened it was necessary to replace them before continuing with hoist operation.[6] They also testified that the hoist was operating properly on the night in question; however, their opportunity to observe its operation was limited due to the fact that they were all engaged in other duties on the rig floor.

On the other hand, Cormier and Palombo, who were working on the pipe barge when the accident happened, said that they had to use ropes to swing the boom laterally in lifting the pipe to the drilling barge. Palombo

testified that from the pipe rack on Rowan No. 1 to the V-door, the automatic controls seemed to work "pretty well". On cross-examination, he stated that sometimes the hoist would "slip" if a load was lifted and held suspended. Cormier testified that the hoist seemed to lose power and the load would "drop a couple of feet", and that because of this he had instructed the men to be very careful. This testimony is inconclusive and contradicted by some of the Rowan crew who had used the hoist regularly in prior operations. The weight indicator charts used on the rig during this operation show that there was no down time or work stoppage during this entire operation such as would have occurred if the cable had slipped off the drum and been replaced.1/

We find from a preponderance of the evidence on these issues that the cables on the turntable drum did not slip out of place on the night in question, and that the boom responded properly to the automatic controls when lifting pipe from the pipe rack to the V-door. And, we cannot say from the evidence that the "bleed off" under a heavy load was the result of any other failure or defect in the hoist such as to render it unseaworthy, or not reasonably fit for its intended use.

All of the Pelican crew testified that they were very tired. Cormier requested relief at ten o'clock p.m. and again at about two o'clock a.m. Mr. Ditch, the Union superintendent, and the man in charge, had retired for the night. None of the Rowan men had authority to order a relief crew to come out. Mr. Beville, Rowan's toolpusher, stated that no one requested relief of him that he can remember; but if they had, he would have taken the matter up with Mr. Ditch. Under these circumstances, Union's failure to exercise

reasonable care for the safety of the men furnished to it by Pelican was negligence, and its failure to provide a sufficient number of men to do the work that had to be done resulted in an unseaworthy, undermanned ship, which rendered the vessel itself not reasonably fit for her intended use and dangerous to the well being of those aboard her. See Norris, Law of Seamen 3rd. Ed. § 616, at p. 176; Waldron v. Moore-McCormack Lines, 1967, 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482; American President Lines, Ltd. v. Welch, 9 Cir. 1967, 377 F. 2d 501, cert. den. 389 U.S. 940. We find that the inattention of George in allowing the load to swing toward Dugas, as well as the fact that Dugas had turned his back to the load and failed to watch it, as he should have, were the result of their fatigue, a condition that could and should have been foreseen by Union. No effort was made to allow these men to even have a few minutes rest after they began running pipe, or to provide them with food although there was food available. They came aboard, went about their appointed tasks as directed by Mr. Ditch and were thereafter completely neglected. We hold that this failure on the part of Union and the resulting unseaworthiness of the ship was the sole proximate cause of the accident.

We are convinced, after reviewing our trial notes, that the observation made by the Court at the conclusion of the trial that George and plaintiff were themselves negligent on this occasion was erroneous, and now correct it. Their dereliction, if any, was caused by fatigue due to the hours they had been required to engage in sustained heavy labor without relief, and cannot, in our opinion, be charged against either one of them as negligence contributing causally to this accident. It was, in fact, a reasonably

foreseeable consequence of Union's failure to provide an adequate crew for the Rowan No. 1, which was at that time under its control.

Plaintiff, by original complaint and a series of amendments, began the trial claiming damages from his employer Pelican and its insurers, Tri-State Insurance Company and Underwriters of Lloyds of London (hereinafter referred to as Tri-State), under the Jones Act, 46 U.S.C.A. § 688, and Union and Rowan as a Sieracki Seaman[8] for negligence and the unseaworthiness of the vessel Rowan No. 1 and, alternatively, under the Jones Act as the borrowed servant of Union and/or Rowan. These alternative claims under the Jones Act were not formally pleaded until October 30, 1967, when the last amended complaint was filed.

We start with the question of whether or not Dugas was a seaman or member of the crew of any vessel in the flotilla assembled at this location for the special purpose of fostering the primary mission of the mother ship Rowan No. 1, and/or of that sometimes floating sometimes sunken navigational hybrid herself.

To classify as a member of the crew of a vessel one must be employed in the sense that (1) he is more or less permanently assigned to a vessel in navigation, or performs a substantial part of his work on the vessel, (2) his duties aboard her are of such nature that they contribute to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. Offshore Company v. Robison, 5 Cir. 1959, 266 F. 2d 769, 75 ALR 2d 1296; Producers Drilling Co. v. Gray, 5 Cir. 1966, 361 F. 2d 432; Marine Drilling Co., Inc., et al v. Autin, 5 Cir. 1966, 363 F. 2d 579, fully discuss the

development of the law on this question. In Stanley v. Guy Scroggins Const. Co., 5 Cir. 1961, 297 F. 2d 374, it was held that the length of time a person might be employed aboard a vessel was not necessarily determinative of his status as a member of the crew, if his employment was on a full time, twenty-four hour basis to work " in the regular operations of the vessel." (297 F. 2d at 378, emphasis added.)

In this case, Union owned the service barge on which the pipe was located when the Pelican crew reported aboard. It was in navigation at that time, its purpose being to supply drill pipe to Rowan No. 1 while the drilling crew was in the process of "going back into the hole," so that drilling could be resumed. The Pelican crew was there to get this string of pipe from the service barge to the drilling floor. They were working members of the crew of Rowan No. 1, sending the pipe up when called for by the drilling crew. All, not merely a substantial part, of the work they did from the time they arrived on September 8 until the time they left after plaintiff's accident was an integral part of the regular operations for which the drilling barge and its service fleet were designed and assembled. Robison, supra. They were there for whatever length of time was required to complete running the pipe back into the hole, not as specialists rendering a service not usually performed by the regular drilling crew,[9] but providing general labor necessary to enable Rowan No. 1 to accomplish her mission. Under Stanley, supra, the fact that Dugas' stay aboard was of short duration does not, as a matter of law, require a different conclusion.[10] Nor does the fact that his duties carried him aboard more than one vessel defeat his claim as a seaman. As we have

seen, the service barge was simply an appurtenance or extension of the drilling barge under the circumstances of this case, lending support to that vessel. Cf. Braniff v. Jackson Ave.-Gretna Ferry, Inc., 5 Cir. 1960, 280 F. 2d 523.

Having concluded that plaintiff was employed as a seaman or member of the crew of the vessel Rowan No. 1, it is necessary to decide who his employer was under the Jones Act, measured by the Federal Employer's Liability Act, Title 45 U.S.C.A. § 51. Cosmopolitan Shipping Co. v. McAllister, 1949, 337 U.S. 783, 69 S. Ct. 1317, 93 L. Ed. 1692 (see especially 337 U.S. at 795). The relationship is generally to be determined by common law standards considering the words in their ordinary and usual sense. Shenker v. Baltimore & Ohio R. Co. 1963, 374 U.S. 1, 83 S.Ct. 1667, 10 L. Ed. 2d 709; Ward v. Atlantic Coast Line R. Co., 1960, 362 U.S. 396, 80 S. Ct. 789, 4 L. Ed. 2d 820; Baker v. Texas & Pacific Railway Co., 1959, 359 U.S. 227, 79 S. Ct. 664, 3 L. Ed. 2d 756; Ruiz v. Shell Oil Co., 5 Cir. 1969, 413 F.2d 310; Southern Shell Fish Co. v. Plaisance, 5 Cir. 1952, 196 F. 2d 312; Pennsylvania R. Co. v. Barlion, 6 Cir. 1949, 172 F. 2d 710; Cimorelli v. New York Central Railroad, 6 Cir. 1945, 148 F. 2d 575. Ruiz v. Shell Oil Co., supra, is the latest expression in this circuit on the so-called borrowed servant or employee pro hac vice relationship, which stems from the early case of Standard Oil Co. v. Anderson, 1909, 212 U.S. 215, 29 S.Ct. 252, 53 L. Ed. 480. All facts and circumstances in each particular case must be taken into consideration. See Norris, Law of Seamen 3rd. Ed. Vol. 2, §§ 670, 671.

In Baker v. Texas & Pacific R. Co., supra, the Supreme Court phrased the problem thus:

> "The Federal Employers' Liability Act does not use the terms "employee" and "employed" in any special sense..., so that the familiar general legal problems as to whose "employee" or "servant" a worker is at a given time present themselves as matters of federal law under the Act ... It has been well said of the question that "[e]ach case must be decided on its peculiar facts, and ordinarily no one feature of the relationship is determinative." Cimorelli v. New York C.R. Co. (CA 6 Ohio) 148 F.2d 575, 577... the question --- contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under the law. See Restatement, Agency 2d, § 220, comment (c); § 227, comment (a)." (Emphasis supplied. 359 U.S. at 228)

In Ruiz v. Shell Oil Co., supra, speaking of the right to control or direct the details of the work, the court said:

> "The factor of control is perhaps the most universally accepted standard for establishing an employer-employee relationship, and what constitutes "control" has been the subject of much litigation . . . .
>
> Although a formal agreement between the two is not considered indispensable to the borrowed-servant relationship, the very terms "borrowed" and "loaned" connote some type of agreement, understanding, or meeting of the minds between the borrower and the lender. . . . ." (413 F.2d 310, at 312, 313).

Based upon these and other factors involved in that case, the court concluded that there was no employer-employee relationship between the plaintiff and the defendant tort feasor such as would preclude recovery.11/

Restatement, Agency 2d, § 220, referred to in Baker, Ward, and Ruiz, supra, lists the criteria by which the relationship is to be determined.12/ Applying these criteria to our facts, it is clear that control over the work done by the Pelican crew was vested in Union, through Mr. Ditch. Under the contract between Union and Rowan, while on day work, the entire drilling barge was subject to Union's right to control the operation and to prescribe procedures. Even Rowan's crew was "used" by this company. The Pelican roustabouts were mere laborers, and in this instance while performing services aboard a vessel, the work was necessarily done subject to the right, vested in the owner or operator, to specify when, how and in what manner the services were to be performed. Here, Union supplied its own service barge and pipe, but used Rowan's drilling barge and its equipment to achieve the result desired by it. Little, if any, skill was required for the operation, the employment was for an indefinite length of time, the Pelican crew was paid by the hour, through Pelican, which in turn billed Union by the hour on a per-man basis. Further, the work was in the regular business of Union, in furtherance of its oil drilling operation. We conclude that plaintiff Dugas was, at the time of his injury an employee of Union as that term is used in the Federal Employers' Liability Act, 45 U.S.C. A. § 51, incorporated into the Jones Act, 46 U.S.C.A. § 688, under which he claims, as were all of the other members of the Pelican crew. Cf. Hanks v. The California Co., W.D. La. 1967, 280 F. Supp. 754; Hebert v. California Oil

Company, W.D. La. 1967, 280 F.Supp.754; In re Tidewater Oil Company, E.D. La. 1970, 321 F. Supp. 14, and cases there cited.

The same considerations impell us to conclude that the Rowan crew, drilling barge and equipment were merely rented to Union at the time of this accident, according to the contract between those parties.[13] The Union-Rowan contract stops just short of being a bareboat or demise charter of Rowan No. 1, after contract depth was passed.[14]

Having found that plaintiff was a borrowed servant of the defendant Union; that he enjoyed seaman's status, and that his injury was caused by the negligence of Union and the unseaworthiness of the Rowan No. 1 brought about by that negligence, plaintiff should have judgment against Union under the Jones Act, and against Rowan for the unseaworthy condition of the vessel owned by it.

Union argues, however, that the plaintiff's claim against it under the Jones Act was brought too late and is time-barred, as plaintiff's supplemental complaint against it was not filed until October 30, 1967, more than three years following the injury. Claussen v. Mene Grande Oil Co., 3 Cir. 1960, 275 F. 2d 108; Roth v. Cox, 5 Cir. 1954, 210 F. 2d 76; and Lowery v. Department of the Army, 1957 AMC 158, are cited for this position. In Claussen, the accident occurred in 1947, suit was filed in 1956, in Roth, the death occurred in January, 1949, suit was filed in October, 1952. Both cases involved actions originally filed after the three-year period of Title 45 U.S.C.A. § 56 had run. Lowery is completely inapposite. Here, the ultimate facts upon which plaintiff predicated his original and first amended complaints against Union were not changed by the amendment

of October 30, 1967, and they were sufficient to sustain his cause of action under the Jones Act. Under F.R.C.P. Rule 15(c), 28 U.S.C.A., such an amendment relates back to the time of filing the original demand, as it adds nothing more to the claim than an alternative theory of recovery based upon the same facts. See Moore's Federal Practice, paragraph 15.15(3), Vol. 3, pages 1025 et seq. The amendment merely articulates expressly what was readily deductible from the original pleadings and the contractual arrangements between Union, Rowan and Pelican, available to these parties but shrounded in mystery insofar as this plaintiff was concerned.

What has been said applies to the relationship of plaintiff vis-a-vis defendants Union and Rowan. It does not necessarily follow that he did not remain an employee of Pelican. See Porter v. St. Louis-San Francisco Railway Co., 5 Cir. 1966, 354 F. 2d 840, at page 843, where the court said:

> "That a servant of one master may under some circumstances be the servant of two masters at the same time is recognized in Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Linstead v. Ches. & Ohio Ry., 276 U.S. 28, 48 S. Ct. 241, 72 L. Ed. 453; Brailey v. Baltimore and Ohio Railroad, D.C., 151 F.Supp. 431; Oliver v. Northern Pac. Ry. Co., (D.C. E. Wash. 1912) 196 F. 432."

See generally, Restatement 2d, Agency, §§ 220, 226, 227 and comments; 56 C.J.S. Master and Servant, § 2d(2), pp. 37, 38. There is nothing inconsistent in the relationship under the facts of this case; Dugas actually served the purposes of Union and Rowan as a

crew member of Rowan No. 1, and the business of Pelican, which was that of a labor broker in this instance.

Before discussing quantum, we next consider the various cross-claims and third-party demands remaining in the case.

UNION v. ROWAN

Union seeks indemnity from Rowan under the express provisions of the contract, viz:

> "CONTRACTOR agrees to indemnify, defend and save UNION harmless, including its officers and employees, from any and all loss, damage, injury, liability or other causes of action, and costs thereof, including . . . claims for injury . . . to [any person] . . . except such loss, damage, injury or liability as is, by final judgment, proven to be caused by the sole negligence of UNION." (Emphasis supplied.)

In view of our findings and conclusions on the main demand, this cross-claim, by the very terms of its contractual underpinnings, must self-destruct.

Rowan is cast in judgment to plaintiff as a joint tort feasor because of its failure to provide a seaworthy vessel, a species of tort liability without fault. It has made no claims against Union in this case. Union's cross-claim is broad enough to support a claim for contribution under Horton & Horton, Inc. v. T/S J. E. Dyer, 5 Cir. 1970, 428 F. 2d 1131, cert. den. 1971, 400 U.S. 993. Judgment will be rendered in favor of Union for one-half the amount of the award.

UNION v. PELICAN AND TRI-STATE

Like plaintiff's case, this cross-claim is before us in installments. Union first asserted a right to indemnity against Pelican under the terms of their contract, Union Exhibit 1, page 2, which expressly requires Pelican to indemnify Union for injuries" . . . to Contractor's [Pelican's] employees, . . . incident to or resulting from any and all operations performed by Contractor under any of the terms of this contract." Union amended to claim against Pelican and its insurer under the insuring agreements, which required Pelican to obtain an endorsement on its workmen's compensation and employer's liability policy, providing that a claim against Union by one of Pelican's employees "based on the 'Borrowed Servant Doctrine' will, for the purpose of this insurance, be treated as a claim arising under this policy against Contractor and that Union and/or its Underwriters will receive the benefit of this insurance with respect to such claims." Union Exhibit 1, paragraph 6A, f. Alternatively, Union seeks damages from Pelican in the event such an endorsement was not obtained. Insurance coverages listed in the agreement include exposure under the Longshoremen's and Harbor Workers Act, Death on the High Seas Act, and Admiralty coverage, including Transportation, Wages, Maintenance and Cure.

Pelican did not procure the endorsement demanded by paragraph 6A, f, but it did obtain Endorsement #6, amending Coverage B (Employer's Liability) to include operations offshore in the Gulf of Mexico, and providing that:

> "Limits of Liability - Coverage B:
> The words 'damages because of

> bodily injury . . .' include . . . damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment."

The provisions demonstrate that it was contemplated that at least some of the laborers furnished by Pelican to Union would be required to work on vessels on navigable waters. As to these operations, the contract must be considered as maritime in nature. See Benedict on Admiralty, 6 Ed. Vol. 1, §§ 60-65. In this case particularly, Union requested and obtained men to work running pipe on Rowan No. 1, and, in the process, to remove the pipe from its own service barge. It was, therefore, "a contract relating to a ship in its use as such or to commerce on navigable waters . . ." Benedict, supra, § 64, and is governed by federal, not state, law. Transcontinental Gas Pipelines Corp. v. Mobil Drilling Barge, 5 Cir. 1970, 424 F. 2d 684, at 691:

> "Of course, the construction of a maritime contract is governed by federal, not state, law. E.g., Halliburton Company v. Norton Drilling Company, 5 Cir. 1962, 302 F. 2d 431, cert. den. 374 U.S. 829, 83 S. Ct. 1870, 10 L. Ed. 2d 1052; A/S J. Ludwig Morwinkeles Redevi v. Commercial Steve. Co., 2 Cir. 1958, 256 F. 2d 227, cert. dismissed, 358 U.S. 801, 79 S. Ct. 9, 3 L. Ed. 2d 49."

The rule of this circuit, as expressed

in Batson-Cook Company v. Industrial Steel Erectors, 5 Cir. 1958, 257 F. 2d 410, is that unless the contract clearly and unequivocally expresses the intention of the parties that the indemnitor, in this case Pelican, will indemnify the indemnitee against the consequences of his own negligence, such an intent will not be read into the agreement or otherwise presumed. The contract need not contain the talismanic words "'even though caused, occasioned or contributed to by the negligence, sole or concurrent', of the Indemnitee, or like expressions." Transcontinental Pipeline Co. v. Mobil Drilling Barge, supra, United States v. Seckinger, 5 Cir. 1969, 408 F. 2d 146, reversed on other grounds, 397 U.S. 203, 90 S. Ct. 880, 25 L. Ed. 2d 224, 1970; In re Tidewater Oil Co., E.D. La. 1970, 321 F. Supp. 14, and cases cited.[15]

In White v. California Company, W.D. La. 1965, 260 F. Supp. 586, aff'd sub. nom; Boyle v. California Co., 5 Cir. 1966, 369 F. 2d 699, the indemnity provision of the contract was almost identical to the one before us. Our learned brother, Judge Edwin F. Hunter, Jr., allowed California's claim for indemnity to the extent of attorney's fees and costs incurred to date of compromise of plaintiff's claim where the indemnitor refused a defense. The facts do not disclose whether or not the indemnitee was at fault in that case.

Despaux v. California Company, E.D. La. 1968, 286 F. Supp. 558, involved a similar provision. Judge Rubin denied a claim for attorney's fees, where the indemnitor had agreed to accept the defense, but refused liability on grounds of unseaworthiness if such was found. This court granted indemnity under a much broader clause in

Seneca v. California Oil Co., W.D. La. 1964, 244 F. Supp. 350, where it was apparent and known to the indemnitor at the time suit was filed that the claim was groundless as to the indemnitee.

In this case, Pelican's obligation was to furnish laborers to Union. The crew sent out to Rowan No. 1 was carried on its payroll, and Dugas, with his co-workers, served the interests of Pelican as well as Union. As we stated in Hanks v. California Company, W.D. La. 1967, 280 F. Supp. 730, these service organizations "provide valuable and convenient sources of labor to oil companies, ready and able to commence operations when and where desired on short notice."

In the Hanks case, plaintiff was a chief steward for Universal Services, a catering concern aboard a California tender. We found a negligent breach of duty by his employers ashore which rendered Universal liable under the indemnity provisions of that contract, similar in tenor to the case at bar. There was no active negligence on the part of the principal, California Company, and the duty to indemnify was obvious. Moreover, Hanks was a specialist in his field, and Universal Services, Inc., his employer, held itself out as possessing the requisite expertise to operate, supply and man the galley of California's tender. Cf. Whisenant v. Brewster-Bartel Offshore Company, supra, note 9, and In re Tidewater Oil Company, supra.

As we have pointed out, Pelican dealt with unskilled laborers. Dugas was not a specialist and neither he nor his foreman controlled the manner in which their work was to be done. Union and Pelican, under these circumstances agreed that if any of the Pelican

employees were injured and claimed against Union, for whatever reason, the former would indemnify the latter. For this reason, Union required Pelican to carry insurance protecting it from such claims, even though Pelican's employees were held to be its "borrowed" or "rented" servants, as was the case. It seems to this court that the conclusion is inescapable that the indemnity provisions here imposed the duty upon Pelican to hold Union harmless for injury to its employees, even if the injury resulted from Union's negligence. In this connection, we note that as to damages to any of Union's equipment, Pelican's liability is limited to damages resulting from its own negligence, which, read in connection with the whole of paragraph 6 of the contract, titled "Indemnification and Insurance", gives substance to this interpretation. In fact, Pelican did insure itself against just such a contingency by procuring Endorsement # 6 of the Tri-State Policy, quoted above, and, in addition, attempted to engraft into this case a suit against its insurance agent for failure to obtain the specific endorsement called for by paragraph 6A, f of this agreement.

While not necessary to this decision, the insuring clauses would limit Pelican's liability to the limits of the insurance required, $100,000.00 for each person injured and $300,000.00 for any one accident. Dickerson v. Continental Oil Company, 5 Cir. 1971, 449 F.2d 1209, at 1222.[16]

Judgment will be entered in favor of Union against Pelican for one-half of the amount of the award hereinafter made, plus attorney's fees and costs of defense. The Tri-State policy does not provide coverage to Union; consequently, Union's cross-claim against it is denied.

ROWAN v. PELICAN v. ROWAN

On October 19, 1967, Rowan filed a cross-claim against Pelican bottomed on two theories, first that any liability that might be visited upon it because of plaintiff's injuries would be vicarious, caused by the active negligence of Pelican's employees, and it should be indemnified by Pelican on a tort theory of indemnity as in Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co., 5 Cir. 1969, 410 F. 2d 178, and, secondly, that it is a beneficiary of any rights Union might have under its contract with Pelican.

Shortly thereafter, Pelican and Tri-State filed an identifical cross-claim against Rowan.

Rowan did not provide a seaworthy vessel to the members of the crew of Rowan No. 1. This is a nondelegable duty owed by the shipowner. It chose, in its contract with Union, to permit Union to man its vessel after contract depth was reached, placing its own primary employees under the control of Union, as a result of which the drilling barge was undermanned for this particular operation and hence unseaworthy. By recognizing the relationship between it and Union for what it was and providing for a demise or bareboat charter to the latter while on day rate, it could have avoided this responsibility, but it did not do so. Pelican was not at fault in this instance, so recovery on the basis of tort indemnity as in Tri-State, supra, is not available to Rowan.

Nor can Rowan claim the benefit of the indemnity clause in the Union-Pelican contract under the rule of Ryan Stevedoring Co. v. Pan Atlantic Steamship Co., 1956, 350 U.S.

124, 76 S. Ct. 232, 100 L. Ed. 133; Crumady v. Joachim Hendrick Fisier, 1959, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, as extended in Whisenant v. Brewster-Bartle Offshore Company, 5 Cir. 1971, 446 F. 2d 394, for the reason that Pelican did not contract to perform any specialized operation aboard Rowan No. 1, it did not take control of any specific area of the ship or any specific operational function thereof. It merely furnished a labor crew to Union to use at its pleasure and under its direction. Under such circumstances we decline to apply the doctrine of Ryan Stevedoring Co. v. Pan Atlantic Steamship Co., supra, and related decisions, to this case. The contract between Pelican and Union was personal, that is to say, its requirements for indemnity and insurance were were for the benefit and protection of Union, intended to make a source of labor available to it on short notice and to place the burden of providing insurance coverage for Union's liability to these workmen on Pelican, the lending employer. Pelican contracted to do this for Union's benefit only. Rowan's cross-claim against Pelican and Tri-State is, accordingly, denied.

On the other hand, Pelican's liability to Union is not in tort, but is contractual. Rowan has breached no duty owed to Pelican, its responsibility to plaintiff is for the unseaworthiness of its vessel. Pelican has suffered no loss caused by Rowan; on the contrary, it benefits from Rowan's absolute liability to Dugas as shipowner to the extent that Union's recovery against it is reduced by one-half of the amount of the award made to Dugas. The cross-claims of Pelican and Tri-State against Rowan will also be denied.

PELICAN vs. MARKET

Pelican has filed a third-party demand against Market Insurance Company, its public liability insurance carrier, on grounds that Dugas was the borrowed servant of Union at the time of his injury and, therefore, not within the exclusionary clauses of the policy which deny coverage for injuries to employees of the insured. We find this demand to be without merit. As pointed out above, Dugas continued in Pelican's general employ under the facts of this case, and the exclusionary clauses of Market's policy do have application here. We regard the contract of insurance as the law between these parties, and deny this cross-claim.

QUANTUM

Plaintiff's left leg and ankle were broken as a result of the accident. He struck his head, and, according to his testimony, he has also suffered with his back since the accident. Plaintiff was treated by Dr. Lopez of Morgan City, Louisiana, on the day of the accident, for fracture of the left ankle and the left leg, just above the ankle. The breaks were serious. His leg was placed in a cast, and he was allowed to leave for Abbeville, where he lived, on the same day. He was sedated for the trip. Thereafter he consulted Dr. Larry A. Giffen, an osteopathic surgeon of Beaumont, Texas, on October 10, 1964. At that time his leg was in a walking iron cast. Because of plaintiff's complaints of back pain, Dr. Giffen had x-rays made of the lower back. These showed a narrowing of the interspaces at the level of L4-L5, and straightening of the lordotic curve. He treated him with muscle relaxants and ultrasonic vibrations. He saw plaintiff again on

February 18, 1965, and in May, 1965, on July 7, 1965, and November 30, 1967.

In February of 1965 Dr. Giffen referred Dugas to Dr. McNeill, an orthopedist, for consultation. On March 1, 1965, Dr. McNeill reported that in his opinion no permanent disability had resulted from the injuries sustained by plaintiff. He also expressed the view that the leg cast had been on too long and should be removed. Dr. Giffen removed the cast and x-rays of the leg and ankle showed evidence of healing. There was some atrophy in the left leg and some residual deformity in the ankle due to the cast having been on over so long a period of time. Dr. McNeill went into the armed forces and was not available to testify at the trial. Dr. Giffen, however, was confident that plaintiff would regain the use of his leg and ankle and that this injury would not prevent him from returning to heavy work. He last saw plaintiff in November, 1967. He noted some objective symptoms of a back condition then, which could have been caused by the protracted use of the cast on plaintiff's leg. He did not have the benefit of a myelogram, and his findings in regard to plaintiff's back condition are not conclusive. He had additional x-rays of the back made in November, 1967, but had not seen them or received any report in regard thereto at the time his deposition was taken.

Dr. Thomas Campanella, an orthopedist of Baton Rouge, saw Dugas on three occasions, the first being in July, 1967, on September 26, 1967, and again in April, 1970. His opinion was that the ankle and leg had healed, and that there was a fifteen per cent disability of the leg, or a five per cent disability of the man as a whole. He found no disabling back condition. His opinion as to plaintiff's

back was based upon his clinical findings and x-rays made at the time. Dr. Campanella did say that the ankle condition would be helped by the use of proper shoes, such as the work boots customarily worn by oil field workers, and that plaintiff could return to heavy work.

At the time of this accident in 1964, plaintiff was twenty-nine years of age and was earning approximately $5,000.00 per year. According to his own testimony he did not go back to work until approximately one year after the accident, when his brother secured employment for him in Dallas at a job that merely required him to push a button. He worked in this position for a year, and was employed at the time of trial as a janitor in a school in Morehouse Parish, Louisiana, at a salary of $225.00 a month.

A report prepared by Mr. Donald E. Vaughn, an actuary of Baton Rouge, calculates the present value of plaintiff's normal working income at a slary of $5200.00 per year, discounted at 4% per annum, at $151,397.00. Obviously, under the facts of this case, the conclusion reached by Mr. Vaughn is wholly inapplicable.

The evidence shows that plaintiff suffered a great deal of pain from the time of his accident until he was sedated upon reaching the hospital in Morgan City. Thereafter, the cast applied to his leg caused some inconvenience, and he doubtless experienced some additional pain in connection with the leg injuries. Furthermore, we find that plaintiff suffered some pain in his back during the period of his convalescence and treatment by Dr. Giffen, but that the evidence does not justify a finding that this condition was proximately caused by the accident, or that it is permanent. Plaintiff also introduced

the written report of Dr. Charles R. Smith, dated May 24, 1967, in lieu of his testimony. Dr. Smith, a psychiatriat of New Orleans, expressed the opinion that plaintiff waa suffering from an extreme anxiety reaction which he assumed was the result of the accident. His history was obtained largely from a female companion who accompanied Dugas. On the other hand, Dr. Thomas L. Rafferty, also a psychiatrist practicing in New Orleans, expressed the opinion that plaintiff was not suffering from any anxiety reaction or psychiatric problem when he saw him in September, 1967. His report is also in evidence in lieu of his testimony by agreement of the parties. We agree with Dr. Rafferty.

We find that the total sum of forty thousand ($40,000.00) dollars will amply and fairly compensate the plaintiff for physical and mental pain and suffering, inconvenience and anxiety, past and future, and for loss of future wages resulting from a diminution of his earning power, if any, caused by this accident, as well as past and future medical expenses resulting from this accident. This sum, plus five thousand ($5,000.00) dollars lost wages during the year he was incapacitated, results in a total of forty-five ($45,000.00) thousand dollars, which recovery is allowed.

It was stipulated that the amount of attorneys' fees that might be owed under the various claims for indemnity in this lawsuit would be fixed by the court at a later date. Accordingly, we will not decide the amount owed to Union by Pelican on this score at this time.

A decree will be entered in keeping with the foregoing.

Lafayette, Louisiana, March 22nd, 1972.

s/R. J. Putnam
United States District Judge

Footnotes 1-16 on pages 56-62

FOOTNOTES

1/ See pretrial stipulation, paragraph 5(h).

2/ Kenneth Ditch, Union's representative on the barge, testified to this effect, as did William Beville, rig superintendent for Rowan. The drilling contract, Union Exhibit 2, page 2, paragraphs 3.3, 3.4, sets out the respective obligations of Union and Rowan while on a day rate basis, as follows:

"3.3 Day Work Basis Operations: All operations conducted after reaching the specified contract footage depth shall be on a day work basis, except when Paragraph 4.2 applies and CONTRACTOR shall be paid for such operations at the applicable day work rate specified below. If UNION so desires, CONTRACTOR agrees to continue operations below contract footage depth. For all work done on day work basis UNION shall furnish the items listed in Exhibit "A" Paragraph 4.

3.4 Day Work Rates: When UNION shall use CONTRACTOR'S crew, drilling machinery, and drilling equipment in the performance of work necessary for drilling below contract depth, coring, logging, perforating, acidizing, setting liners, swabbing, installing connections and other items of work and labor, commonly known as "day work", it is agreed:

(a) Save for CONTRACTOR'S responsibility to maintain his equipment and to operate in a workmanlike manner, procedures under "Day Work" shall be prescribed by UNION.

(b) While operations are being conducted on a day work basis and expressly subject to provisions of Paragraph 3.4(c) hereof, UNION agrees to pay CONTRACTOR the cash value as established by joint appraisal, of all underground equipment, such as drill pipe, drill

collars, tool joints and subs, which may be lost, damaged or destroyed by accident while such equipment is being used in the hole; and CONTRACTOR shall not be held responsible for damage to or loss of the hole while on day work basis. Any liability on the part of UNION under the terms hereof shall be to the extent only that CONTRACTOR'S insurance does not cover any such loss or damage.

(c) CONTRACTOR assumes full liability, while operations are being conducted on a day work basis, for losses occurring to equipment, and for fishing expense or damage to the hole, as a result of negligence of CONTRACTOR, its employees, agents or representatives, or their failure to properly carry out orders of UNION'S representatives as agreed by both parties.

(d) CONTRACTOR is to have a full drilling crew of 6 men working at all times when receiving pay at the per diem rate stipulated. If the drilling crew numbers more than 5 men, for each man the crew is short down to the 5 man crew level, $4.50 per hour will be deducted from the CONTRACTOR'S charges. For a shortage of men below the 5 man crew level, 1/5 of the per diem rate will be deducted for each man short. It is further understood that payment on per diem basis under this clause does not in any way release CONTRACTOR from the obligations set out in Paragraph 5 hereof, or any other responsibilities in connection with the drilling of the hole.

(e) UNION shall reimburse CONTRACTOR for actual cost of any additional labor furnished at request of UNION.

(f) While operations are being conducted on a day work basis, UNION shall have the

right to direct stoppage of such work at any time, and in such event UNION shall be under no further obligation to CONTRACTOR except for work previously performed."

3/ Union Exhibit 2, Exhibit A attached thereto, paragraphs 5.23, 5.24. Tug and barge were to be provided by and at the expense of Union, whether or not on day rate.

4/ The contract called for Rowan to furnish 5" drill pipe to the contract depth, and to furnish transportation to haul and unload rig supplies onto the service barge, but specified that Union was to furnish any other drill pipe used in the operation. Union Exhibit 2, Exhibit A attached thereto, page 2, paragraphs 3.1, 3.15; page 3, paragraph 4.23. This was a "special string of drill pipe" under the last cited contract provision.

5/ Union Exhibit 1.

6/ See photographs Rowan No. 5 and No. 6.

7/ See exhibits Rowan I and II. Crowson, Rowan's derrick man and hoist operator, estimated time to put cable back on turntable at 10 minutes; Williams, 15 minutes; Beville, toolpusher, one hour; Adams, driller, 30 to 35 minutes. Crowson also testified that as derrick man he would ordinarily operate the hoist and had used it frequently. He used the automatic controls, and when the hoist lever was released by the operator it would automatically return to neutral position. Williams, the motorman, also operated the hoist. He testified that if controls were in neutral, the load would be held suspended, but the brakes should be set to prevent the load from "bleeding off". The brakes were manually operated.

8/ Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

9/ Compare: Whisenant v. Brewster-Bartel Offshore Company, et al, 5 Cir. 1971, 446 F. 2d 394.

10/ See also: Butler v. Whiteman, 1958, 356 U.S. 271, 78 S. Ct. 734, 2 L. Ed 2d 754; Williams v. Millwhite Mud Sales Co., E.D. La. 1961, 197 F. Supp. 730.

11/ Ward v. Atlantic Coast Line R. Co., supra, emphasizes that the agreement between the parties themselves is not conclusive in the following language:

> "But neither the railroads communication of its concept of petitioner's status to petitioner, nor his acquiscence therein, if shown, is determinative of the issue. Cf. Cimonelli v. New York Cent. R. Co. (CA 6 Ohio) 148 F. 2d 575, 578. The parties' characterization is but one factor to be considered among others. See Restatement, Agency 2d § 220(2) (i), and the issue is one for determination by the jury on the basis of all the relevant factors..." (362 U.S. at 399,400)

12/ "§ 220. Definition of Servant.

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other s control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master

may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business."

13/ Note 2, supra, Paragraph 3.4, Union Exhibit 2. This paragraph and other provisions of the contract leave little doubt in our mind that while on day work, Rowan merely rented its equipment and crew to Union on a daily basis. The control shifted to Union after contract depth was reached, and Rowan's status as an independent contractor, if it ever existed, terminated. See: The Legal

Position of the Drilling Contractor, 1st Oil & Gas Inst. 183, (SW Legal Fdn., Mathew Bender, 1949)

14/ Only the fact that Rowan remained responsible for maintenance of its equipment under the contract, precludes this finding. The Supreme Court, in Guzman v. Pichirilo, 1962, 369 U.S. 698, 82 S.Ct. 1095, 8 L Ed 2d 205, summarized the requirements of a bareboat charter as follows:

> "To create a demise the owner of the vessel must completely and exclusively relinquish "possession, command, and navigation" thereof to the demisee. (Citing authorities.) It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all..." (Emphasis supplied.)

15/ Federal law in this area is generally regarded as being the same as Louisiana law. See: Grigsby v. Coastal Marine Service of Texas, Inc., 5 Cir. 1969, 412 F. 2d 1011, at 1039; Gorsalitz v. Olin Mathieson Chemical Corp., 5 Cir. 1970, 429 F. 2d 1033, at 1049; Dickerson v. Continental Oil Co., 5 Cir. 1971, 449 F. 2d 1209, at 1221; and cases cited therein. But see: Chaney v. Travelers Insurance Company, 1971, 259 La. 1, 249 So. 2d 181.

16/ The insuring agreements would also remove the contract from the application of the rule of Bisso v. Inland Waterways Company, 1955, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 911; Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 1963, 372 U.S. 697,

83 S.Ct. 967, 10 L. Ed. 2d 78, and California Co. v. Jumonville, 5 Cir. 1964, 327 F. 2d 988, under the later decisions of Fluor Western, Inc. v. G. & H Offshore Towing Co., 5 Cir. 1971, 447 F. 2d 35, cert. den. 40 L.W. 3394 (1972); Slade, Inc. v. Samson Towing Co., E.D. Tex. 1970, 327 F. Supp. 555. Cf. also Alcoa Steamship Co., Inc. v. Charles Ferran & Co., Inc., et al, 5 Cir. 1967, 383 F. 2d 46, cert. den. 1968, 393 U.S. 836. We do not reach this question as there is no showing of the requisite disparity of bargaining power between Union and Pelican in the record before us.